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No. 88-1331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RANDY ROY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the refusal to allow cross-examination on one benefit received by a witness in exchange for his testimony violates the Confrontation Clause where substantial evidence of other benefits received was elicited, where the witness was unaware of the benefit about which cross-examination was prohibited and where permitting such cross-examination would have informed the jury of the sentence facing the defendant upon conviction.

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully by the argument contained herein, respondent does not believe petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE REFUSAL TO ALLOW CROSS-EXAMINATION ON ONE BENEFIT RECEIVED BY A WITNESS IN EXCHANGE FOR HIS TESTIMONY DOES NOT VIOLATE THE CONFRONTATION CLAUSE WHERE SUBSTANTIAL EVIDENCE OF OTHER BENEFITS RECEIVED WAS ELICITED, WHERE THE WITNESS WAS UNAWARE OF THE BENEFIT ABOUT WHICH CROSS-EXAMINATION WAS PROHIBITED AND WHERE PERMITTING SUCH CROSS-EXAMINATION WOULD HAVE INFORMED THE JURY OF THE SENTENCE FACING THE DEFENDANT UPON CONVICTION.

Petitioner alleges that his rights under the Confrontation Clause of the Sixth Amendment were violated when his cross-examination of the State's chief witness concerning that witness' plea agreement was restricted as to one aspect of the plea agreement. An examination of the proceedings at trial reveals that the limitation placed on the cross-examination did not violate petitioner's rights under the Confrontation Clause.

Petitioner was charged with three drug related offenses, including calculated criminal drug conspiracy. The chief witness against petitioner was Mark Johnson, one of petitioner's co-conspirators. Johnson had entered into a plea agreement with the State in exchange for his cooperation in this prosecution. During his cross-examination of Johnson, petitioner was permitted to show that Johnson had entered into the plea agreement and that pursuant to this plea agreement Johnson would be sentenced to 4 years probation, 90 days in the county jail, a $3,000.00 fine and would forfeit $13,000.00. Furthermore, petitioner was allowed to show that 2 of the 3 charges which had been

pending against Johnson had been dismissed and that one of these dismissed charges carried a mandatory prison sentence. *People v. Roy*, 172 Ill.App.3d 16, 526 N.E.2d 204 (4th Dist. 1988) (Appendix to Petition at pp. A-17 - A-19).

After petitioner's trial counsel began to cross-examine Johnson concerning the mandatory prison sentence for one of the dismissed charges the prosecutor objected to going further with this line of questioning and revealing the length of the mandatory sentence. This objection was sustained because one of the charges for which petitioner was being tried, calculated criminal drug conspiracy, was the same as the dismissed charge being referred to in the cross-examination of Johnson. To have permitted the further examination of Johnson on this question would have revealed to the jury the punishment petitioner would be subject to upon conviction. In affirming petitioner's conviction, the Appellate Court of Illinois noted the rationale for keeping such information from the jury by quoting language from an earlier opinion of that court:

> The jury is the trier of fact and has no duty, authority or responsibility as to the sentences which may, or may not, be imposed. That is within the purview of the presiding judge solely. Not only is a possible penalty immaterial and irrelevant to the jury, but any reference to possible sentence may well prejudice the State's right to a fair trial—a right that is equally important to a defendant's right, and a right that is often forgotten or neglected.

People v. Roy, supra, 526 N.E.2d at 209; Appendix to Pet. at A-24; *citing People v. Lake*, 61 Ill.App.3d 428, 378 N.E.2d 364 (4th Dist. 1978).

It was this single limitation imposed by the trial court upon the cross-examination of Johnson that forms the basis of petitioner's Confrontation Clause argument. This

Court has recognized the discretionary authority vested in trial courts with respect to limiting cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). A review of the proceedings below demonstrates that the limitation placed on the cross-examination of Johnson was a proper exercise of this discretionary authority. Moreover, while a number of approaches have been adopted concerning the problem posed when cross-examination will reveal the sentence facing the defendant if convicted, the approach utilized by the Illinois court below is neither out of the mainstream nor is it constitutionally impermissible.

In *United States v. Garrett*, 727 F.2d 1003 (11th Cir. 1984), cross-examination of one of the government's witnesses revealed numerous aspects of a plea agreement entered into by the witness in exchange for his testimony. This information included the minimum sentence for one of the dismissed charges. When defense counsel started to question the witness concerning the potential sentences for another dismissed charge, the government objected because the subject of this line of questioning was the same charge for which the defendant was being tried. In affirming the decision not to allow this line of questioning, the court noted "pursuit of the proposed line of questioning would have revealed to the jury the severity of the sentence to which [defendant], if convicted, would have been subjected. Because such information would have been extrinsic and prejudicial, the trial court was certainly justified in preventing defense counsel from eliciting it." 727 F.2d at 1012. Limiting cross-examination to prohibit the jury from discovering the potential penalties faced by a defendant has also been approved by the Supreme Court of Kansas (*State v. Davis*, 237 Kan. 155, 697 P.2d 1321

(1985)); the Supreme Judicial Court of Maine (*State v. Larrabee*, 377 A.2d 463 (1977)); the Court of Appeals of New York (*People v. DeVito*, 56 N.Y.2d 846, 438 N.E.2d 875 (1982)); and the Court of Appeals of Idaho (*State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (1984)). Some courts, however, have decided to err on the side of caution and allow the introduction of such evidence. *See, e.g. Jarrett v. State*, 498 N.E.2d 967 (Ind. Sup. Ct. 1986).

While it is clear that the numerous courts which have considered this question have resolved it in differing manners, this diversity of resolutions of this issue is not an indication that the issue need be addressed by this Court. This diversity is merely a reflection of the exercise of discretion. Respondent believes that the controlling questions here should not be whether all courts take the same approach to this question, but whether the issue was resolved in a constitutional manner in this case. Petitioner was allowed to confront and cross-examine Johnson. He was allowed to demonstrate that Johnson had entered into a plea agreement in exchange for his testimony. Petitioner was allowed to show that Johnson was not going to be sentenced to prison and petitioner succeeded in informing the jury that prior to the plea agreement Johnson faced a mandatory prison sentence. The jury was clearly shown that Johnson received a significant benefit from the State in exchange for his testimony, yet the jury chose to believe him. This the jury had the right to do.

There is another and perhaps even more compelling reason to deny this petition. As noted by the appellate court when reviewing petitioner's conviction, the following exchange took place during the cross-examination of Johnson:

Q. Now, one of the cases—one of the charges that is going to be dismissed is calculated criminal conspiracy, isn't it? Both of those, they're going to be dismissed, right?

A. Yes.

Q. That's part of your deal. Now, you like that deal because you're aware that that's got a mandatory prison sentence, right?

A. No, I'm not aware of that.

Q. Doesn't surprise you, does it? Your lawyer hasn't told you that?

At this point, the State's Attorney objected to questioning regarding a mandatory jail sentence.

People v. Roy, 526 N.E.2d at 208; Appendix to Pet. at A-19.

It is, therefore, clear that Johnson was not even aware of the mandatory minimum sentence associated with the dismissed charge. When reviewing a similar situation, the court in *United States v. Del Toro Soto*, 676 F.2d 13 (1st Cir. 1982), noted "it was the witness' understanding of the plea bargain, not the statutory penalty on the dismissed counts, that bore on his credibility." 676 F.2d at 19. Where, as here, the witness is unaware of the mandatory prison sentence on the dismissed charge, the statutory specifics of that charge become irrelevant. Revealing the specifics in no way impacts upon the credibility of the witness and needlessly exposes the jury to information concerning the potential sentence facing the defendant.

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari filed in this cause.

Respectfully submitted,

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